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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LLOYD MCBRIDE, PRESIDENT AND FRANK MCKEE, TREASURER, FOR AND ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND ITS ENTIRE MEMBERSHIP, AND LYNN WILLIAMS, JOSEPH ODORCICH, LEON LYNCH, ERNEST JANAK, ROBERT CLOWERS, DICK EAGLEHOUSE, ROBERT KELLEY, AND FRANK ANGLIN,

Petitioners,

v.

ROCKEFELLER FAMILY FUND, NEW WORLD FOUNDATION, FIELD FOUNDATION, SAMUEL RUBIN FOUNDATION, J. M. KAPLAN FUND, INC., OTTINGER FOUNDATION, COMMUNITY FUNDS, INC., YOUTH PROJECT, AND ASSOCIATION FOR UNION DEMOCRACY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Lloyd McBride, et al., hereby petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, enabling this Court to review the Second Circuit's judgment in *Lloyd McBride, et al.* v. *Rockefeller Family Fund, et al.*, Docket No. 79-7295 (decided November 1, 1979).

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is not officially reported,

but is reprinted at pp. 5a-7a of the Appendix to this petition. The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported, but is reprinted at pp. 1a-4a of the Appendix to this petition.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Second Circuit were issued on November 1, 1979. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Do union members have an implied cause of action to enjoin employers from financing candidates for union office in violation of Section 401(g) of the Labor-Management Reporting and disclosure Act of 1959 (LMRDA), 29 U.S.C. § 481(g)?

2. Does the LMRDA forbid the issuance of injunctions under state law against employer financing of candidates for union office?

STATUTORY PROVISIONS INVOLVED

The pertinent portions of Sections 401, 402 and 403 of the LMRDA, 29 U.S.C. §§ 481-483, are reprinted at pp. 21a-23a of the Appendix to this petition.

STATEMENT OF THE CASE

Proceedings Below

This action was filed by ten members of United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), for themselves and on behalf of all members of USWA, alleging that the defendants—who are "employers" within the meaning of the LMRDA—had violated

federal and state law[1] by spending employer monies to promote certain candidates for office in USWA's 1977 election, and that unless enjoined defendants would continue to make such expenditures with respect to future USWA elections. The complaint sought an injunction against unlawful expenditures by defendants with respect to future USWA elections.[2] All defendants moved to dismiss pursuant to Rule 12(b)(6), F.R. Civ. P., on the ground that the complaint failed to state a claim upon which relief could be granted. On April 9, 1979, the district court granted the motions to dismiss, and judgment was entered in favor of all defendants. Plaintiffs appeal, and on November 1, 1979, the court of appeals affirmed.

Facts Alleged In The Complaint

The complaint, which is reprinted at pp. 8a-20a of the Appendix to this petition, alleges the following facts.

USWA is an international labor organization with approximately 1,400,000 members. Plaintiffs are members of USWA. (App. 9a, 11a).[3]

USWA conducts an election of international officers every four years. The last such election was held in February, 1977, and the next is scheduled for 1981 (App. 11a, 13a).

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[1] Jurisdiction over the state law claims was based upon diversity of citizenship and pendant jurisdiction. (App. 9a-11a). Throughout this brief, "App." is used to designate the Appendix to this petition.

[2] The complaint also sought damages for the injuries sustained by reason of defendants' expenditures with respect to the 1977 election; however, USWA does not seek certiorari insofar as the decision below dismissed the damage claim.

[3] Two of the plaintiffs—the president and treasurer of USWA—sue in their representative capacities, on behalf of USWA and the entire membership of USWA, as authorized by § 12 of the General Associations Law of New York. (App. 9a)

USWA's elections are governed by Title IV of the Labor Management Reporting and Disclosure Act of 1959 (hereinafter "LMRDA" or "the Act"), 29 U.S.C. § 481-483. (App. 11a). Section 401(g) of Title IV, 29 U.S.C. § 481(g), provides in part:

> [N]o moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title.

Defendants are "employers" within the meaning of the LMRDA, 29 U.S.C. § 402(e), and thus subject to the proscription of § 401(g). (App. 12a, 13a).[4]

In USWA's 1977 election, the defendants expended enormous sums to promote the candidacy of one of the slates running for the top offices in USWA. (App. 13a-16a).[5] The monies spent by defendants did not affect the outcome of the 1977 USWA election; all members of the benefited

[4] Although defendants do not employ members of USWA, § 401(g)'s prohibition against "employer" expenditures is "not restricted to employers who employ members of the labor organization in which the election is being conducted, or who have any business or contractual relationship with the labor organization," 29 C.F.R. § 452.78(b). Accord: *Marshall* v. *Teamsters, Local 20*, ___ F.2d ___, 103 LRRM 2111 (6th Cir. 1979). It happens that defendants hold investments exceeding 16 million dollars in companies with which USWA has collective bargaining relationships (App. 13a), but that fact is not critical to the applicability of § 401(g).

[5] The complaint describes the nature of these expenditures in detail. The defendants other than Association for Union Democracy (AUD) contributed monies to AUD, in the form of ostensibly non-partisan grants, but with the actual intention that the monies would be used by AUD for blatantly partisan activities promoting the slate they favored, and, in fact, the monies were so used by AUD with the knowledge and prior approval of the other defendants (App. 13a-14a). AUD opened an unmarked store-front office adjacent to that slate's headquarters. From that office, pursuant

slate lost. Consequently, the Secretary of Labor did not sue to set aside the USWA election; he may sue only in those instances where violations of Title IV may have affected the election outcome.[6] However, defendants have continued to spend monies since the 1977 USWA election to maintain the viability of their preferred candidates for future USWA elections, and unless enjoined from doing so, will continue in the future to spend employer monies to promote candidates in USWA elections in violation of Section 401(g). (App. 16a-17a).

If defendants are not enjoined from making illegal expenditures in future USWA elections, the members of USWA will suffer substantial injury. Section 401(g)'s purpose—to assure union members that those obtaining union office are beholden solely to the members' interests—will be defeated. And if the members invoke the procedures provided by statute to challenge the status of the officers elected with employer assistance, the members themselves will bear the cost of remedying the employers' violations. Under those procedures, the Secretary of Labor will institute a lawsuit *against the union* to set the election aside and

to arrangements negotiated with the slate, AUD put the monies received from the other defendants, as well as its own monies, to the following uses. AUD officials and employees provided campaign services to the slate: holding press conferences, monitoring rival press conferences, drafting campaign literature, providing day-to-day administratrative assistance and support, and participating in the development and implementation of the slate's campaign strategy. AUD recruited and trained observers to work exclusively for the slate (similar services were requested of AUD by the rival slate, but were denied). AUD prepared, printed and distributed tens of thousands of copies of an election manual to supporters of the slate (copies were refused to supporters of the rival slate when requested). Finally, AUD provided legal assistance to the slate in a number of election-related lawsuits (App. 14a-16a).

[6] *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 472 (1968); *Dunlop* v. *Bachowski*, 421 U.S. 560, 570 (1975).

secure a court order directing a new election. Such litigation is costly, and the members' dues will be spent defending the lawsuit. As long as the litigation proceeds, there will be a cloud over title to the office, and thus the union's ability to provide services to the membership will be impaired. And if the court finds that employer contributions may have affected the outcome of the election, it will invalidate the election and order that a new election be conducted at the *union's expense*. Because of USWA's size, a rerun election would cost millions of dollars, and union members' dues thus would be diverted from their intended purposes to pay the price for the defendants' illegal activities. (App. 12a-13a, 17a).

The Causes of Action Asserted In the Complaint

The present lawsuit is filed to prevent these injuries, by enjoining defendants from illegally promoting candidates in future USWA elections. The complaint is in three counts, asserting three distinct causes of action.

Count One asserts an implied cause of action on behalf of union members for injunctive relief against employer expenditures violative of § 401(g) of the LMRDA. Jurisdiction over this count is predicated upon 28 U.S.C. § 1331, 1332 and 1337. (App. 9a, 11a-17a).

Count Two seeks an injunction under state law against future employer expenditures promoting candidates in USWA elections, based upon New York decisional law which makes it a tort to commit intentional acts exposing another to jeopardy under federal law. Jurisdiction over this count is predicated upon diversity of citizenship and the court's power to exercise pendant jurisdiction (App. 9a-11a, 17a-18a).

Count Three seeks an injunction under state law against future employer expenditures on the ground that such ex-

penditures constitute inducement of breach of contract, an actionable tort under New York decisicnal law. USWA's International Union Elections Manual, paralleling § 401(g) of the LMRDA, provides that "no monies of an employer shall be contributed or applied to promote the candidacy of any person" (App. 18a). Count Three asserts that defendants, by their expenditures, induce members of USWA (*i.e.*, the candidates and supporters to whom these expenditures are offered) to breach their contractual commitments to USWA and their fellow members that they will not accept employer assistance. Jurisdiction over this count, like Count Two, is predicated upon diversity of citizenship and pendant jurisdiction (App. 9a-11a, 18a-19a).

The Ruling Below

The Court of Appeals gave the following explanation for affirming the district court's dismissal of Count I of the complaint (i.e. for not implying a private cause of action against employers to enjoin § 401(g) violations (App. 3a-4a)):

> The express remedy for violations of § 401(g), provided by Congress in § 402(g) of the LMRDA, authorizes the Secretary of Labor to conduct investigations and commence civil actions in response to complaints by union members. Appellants admit that the express r medy provided in § 402 is exclusive insofar as it relates to *unions* that violate § 401(g). They nevertheless argue that a private right against *employers* who violate § 401(g) is implicit in the statute.
>
> We do not believe that Congress intended to give union members the right to bring private actions against employers. Congress decided to utilize the "special knowledge and discretion" of the Secretary of Labor in determining which suits to prosecute; proposals to permit private enforcement of Title IV viola-

tions were considered by Congress and rejected. While appellants would have us believe that the rejection of such proposals for private enforcement is no indication of Congressional intent with respect to employers who violate § 401(g), there is no substantial evidence that Congress distinguished employers and union in this area.

The express remedy provided by Congress is adequate to deal with employer contributions to union candidates as well as union contributions to union candidates. If an election outcome is tainted by employer contributions to candidates, the Secretary can act to invalidate the election and oust the improperly elected officials. The remedy is the same, irrespective of the identity of the § 401 violators.

If a private right of action against employers were provided under this statute, the centralization of litigation and the limitation on judicial interference in union affairs which now exist would be disrupted. The purpose of the express remedy in § 402 is to allow the Secretary of Labor to prevent violations of § 401 from resulting in the tainted election of union officials. We hold that Congress did not intend to give individual union members unfettered discretion to pursue individual suits against individual violators.

The Court of Appeals affirmed the dismissal of the state law causes of action with the following analysis (App. 4a):

> [T]he district court did not err in dismissing the state tort claims. *Arnold* v. *District Council No. 9, International Brotherhood of Painters and Allied Trades*, 61 A.D. 2d 748, 401 N.Y.S.2d 811 (1st Dept. 1978), holds that the New York courts will refrain from adjudicating post-election disputes. Moreover, the fact that the torts alleged here are inextricably bound up in the statutory provisions of Title IV of the LMRDA

> provides strong support for the view that the statutory remedies in the Act preclude state courts from addressing these issues.[7]

REASONS FOR GRANTING THE WRIT

In § 401(g) of the LMRDA, Congress forbade employer expenditures promoting candidates for union office. That prohibition was enacted for the special benefit of union members: Congress' objective was "to keep the union leadership responsive to the membership." *Wirtz* v. *Hotel Employees*, 391 U.S. 492, 497 (1968).[8] But Congress provided no *express* cause of action against employers who violate § 401(g): neither the Secretary of Labor, the union, nor the union members are expressly authorized to sue employers. The court below has held that no such cause of action can be implied, and, further, that Title IV precludes the issuance of injunctions even under state law against employer expenditures promoting union candidates. Under the ruling of the court below, the only means for remedying illegal employer expenditures is that expressly provided in § 402 of the LMRDA: a suit against *the union* to set aside the election of employer-financed candidates which—if the suit is successful—will result in a court-ordered rerun election to be conducted *at union expense* (in USWA's case, at a cost of millions of dollars).

The consequences of these holdings are, to say the least, bizarre. Employers may violate § 401(g) with impunity: no

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[7] As explained *infra*, p. 15, n. 14, the holding in *Arnold* was that the third sentence of § 403 of the LMRDA—"The remedy provided by this subchapter for challenging an election already conducted shall be exclusive"—forbids the entry of an order by a New York State Court setting aside a union election and requiring that it be rerun.

[8] See also *Hodgson* v. *Steelworkers*, 403 U.S. 333, 340 (1971); *Marshall* v. *Teamsters, Local 20*, ___ F.2d ___, 103 LRRM 2111, 2114-15 (6th Cir. 1979).

one can make them stop, and no one may hold them accountable. Instead, the full brunt of employer violations must be borne by the union members for whose benefit § 401(g) was enacted. They cannot enjoin such expenditures, and they have but two options when employer-financed candidates are elected: either to accept without challenge a leadership beholden to employer interests (and thus forfeit the very protection § 401(g) was intended to provide), or to challenge that leadership through the express enforcement machinery prescribed in § 402 (and suffer a union crippled by a challenged leadership for the duration of the litigation, and see their own dues diverted to pay for the defense of the lawsuit and the rerunning of the election if it is overturned because of the employer expenditures).

In holding that there is no implied cause of action under Title IV to enjoin illegal employer expenditures, and that Title IV forbids the issuance of injunctions under state law against such expenditures, the decision below misconceives Congressional intent and ignores principles announced by this Court.[9] But the decision below is not simply wrong; it is wrong in a way which will have disastrous consequences for the objectives which Congress sought to achieve by enactment of § 401(g). Simply put, the decision below is an invitation—and a blueprint—for employers who wish to capture or cripple unions. Employers may finance union candidates with impunity, secure in the knowledge that their expenditures, if successful, will either produce union officers beholden to them or, if the election is challenged, subject the union to a crisis of leadership and a fiscal drain.

Of course, if this were what Congress intended, that would be dispositive. But is it *not* what Congress intended,

[9] With respect to the second holding, the opinion also conflicts with decisions of other Circuits.

and this Court should grant certiorari to review the decision below.

I. Is There An Implied Cause Of Action To Enjoin Employer Violations Of § 401(g)?

The question whether union members may sue to enjoin employer violations of § 401(g) is, of course, one of statutory construction. "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. . . . [W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, — U.S. —, 48 L.W. 4001, 4002 (1979).[10]

Title IV neither expressly authorizes nor expressly forbids a cause of action against employers. And the legistive history is totally silent on the question. Congress, having imposed a lone obligation upon employers in a title otherwise addressed to unions, did not focus upon the means by which that lone obligation was to be enforced. Of course, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. . . Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.* at 4003.[11]

Three times, this Court has been called upon to construe Title IV's application to situations which "did not occur to Congress," and to which, therefore, Congress gave no express answer. *Wirtz* v. *Bottle Blowers Assn.*, 389 U.S. 463, 468 (1968). See also, *Wirtz* v. *Laborers Union*,

[10] See also *Touche Ross & Co.* v. *Redington*, — U.S. —, 47 L.W. 4733, 4734-37 (1979); *Cannon* v. *University of Chicago*, — U.S. —, 47 L.W. 4549 (1979).

[11] See also *Cannon, supra*, 47 L.W. at 4553.

389 U.S. 477, 481 (1968); *Hodgson* v. *Steelworkers,* 403 U.S. 333, 338 (1971). The Court's function in these cases was to derive the "proper" construction from an analysis of "the objectives Congress sought to achieve," *Bottle Blowers, supra,* 389 U.S. at 468. The road to discerning legislative intent is no different here.

To assume that Congress intended post-election suits against *unions* to be the sole means for enforcing § 401(g)'s prohibition against *employers* would—for reasons we have recounted above—be to "ascribe to Congress an intent at variance with the purpose of the statute." *Wyandotte Co.* v. *United States,* 389 U.S. 191, 200 (1967). Such a construction "would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibilty for the consequences of his [wrong] onto his victim," *id.* at 204, a result exacerbated in this instance because the victims are the very persons for whose benefit the statute was enacted. Absent "some persuasive indication that [that] interpretation accords with the congressional intent," the bizarre consequences which flow from it argue against "the conclusion that Congress must have intended the statutory remedies and procedures to be exclusive of all others," *id.* at 200. As this Court put it last Term, "when [a private] remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute," *Cannon, supra,* 47 L.W. at 4555.

The court below thought that there was here the persuasive evidence which precludes implication of a private cause of action: Congress' clear rejection of union member suits against *unions* for violations of Title IV. (App. 4a). But that Congress expressly rejected proposals which would have authorized union member suits against unions is not, in this instance, a "persuasive indication" of Congress' intent with respect to such suits against employers. For the reasons which prompted that rejection, described in

Trbovich v. *Mine Workers,* 404 U.S. 528, 532-536 (1972), have no application to suits against employers.

Congress' concern was that if it authorized direct member suits against unions, unions might be inundated by such suits, a result at odds with Congress' plan to legislate union democracy "without undue interference in the internal affairs" of unions. *Id.* at 532-533.[12] Were private suits against unions allowed, defeated candidates could, through litigation challenging the validity of a union election, cast a continuing "cloud on the incumbents' titles to office," [13] and thus seriously threaten the ability of unions to function: Protecting unions against such interference was the *sole* reason for rejecting direct member suits against unions. *Trbovich,* 404 U.S. at 532, 533-534.

But implication of a private suit against *employers* is in no way inconsistent with the congressional objective to protect *unions* against undue interference. There is no indication of a congressional concern with protecting employers who violate § 401(g) from law suits by union members. Nor do such suits threaten the legitimate interests of employers in the respects that caused Congress to reject private suits against unions. Such suits against employers do not intrude upon the "internal affairs" of employers; by definition, when employers elect to spend monies to influence the outcomes of union elections they are engaged in external, not internal, affairs. And employers are not threatened with multiple, burdensome litigation: unlike unions, which are subject to dozens of substantive restraints under Title IV, and thus potentially to dozens of lawsuits at once, employers are subject to but a single restraint: to refrain from promoting candidates in union elections. And, while union

[12] This legislative preoccupation with avoiding undue interference in the internal affairs of unions is also detailed in *Wirtz* v. *Bottle Blowers Assn.,* 389 U.S. 463, 470-471 (1968), and *Hodgson* v. *Steelworkers,* 403 U.S. 333-339 (1971).

[13] *Dunlop* v. *Bachoski,* 421 U.S. 560, 569 (1975).

member suits against unions would pose the danger of individuals seeking "to block or delay union elections," *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964), or to becloud the title to office of a victorious candidate, no such dangers exist in a suit against employers. There is accordingly no reason to think that Congress "intended" that its decision to insulate unions from private actions should be applicable to employers who violate § 401(g).

Indeed, there is every evidence from the legislative scheme that the decision made by Congress to reject private suits against unions is *not* applicable to suits against employers. Having decided to insulate unions from private suits, the members of Congress did not simply throw up their hands and conclude that unions should therefore be left free to ignore with impunity the rights declared in Title IV. Rather, Congress determined that it could effectuate its twin objectives of protecting those rights and insulating unions from undue interference by affording union members the right to file complaints with the Secretary of Labor, who in turn was expressly authorized to sue unions. In this manner, Congress interposed "the screening and centralizing functions" of the Secretary, which Congress deemed the appropriate substitute for direct member suits, *Trobovich*, 404 U.S. at 532-533. The Secretary, however, is not authorized by § 402 to sue employers. To equate the two situations, therefore, does not produce an equivalent result; it produces instead the incongruous result, "extraordinary in our jurisprudence" (*Wyandotte*, supra, 389 U.S. at 200), that the wrongdoer goes unregulated while the consequences of his wrong are visited upon the very persons for whose benefit the statute was enacted.

The holding below that union members may not sue to enjoin employer expenditures violative of § 401(g) thus is wrongly reasoned and wrongly decided. Because that erroneous decision threatens to undermine the Congressional purpose to insulate union elections from employer interference, it warrants the attention of this Court.

II. Does Title IV "Preclude" The Issuance of Injunctions Under State Law Against Employer Expenditures Promoting Candidates In Union Elections?

In dismissing petitioners' quest for an injunction under state law, the court below did not doubt that it had jurisdiction over the claims, nor did it dispute plaintiffs' contention (which respondents had not challenged) that respondents' conduct as alleged in the complaint constituted a state law tort. Rather, the court below ruled that "the statutory remedies in the [LMRDA] preclude state courts from addressing these issues" (App. 4a)[41] That holding mis-

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[14] On its face, the opinion of the court below appears to cite two grounds for its dismissal of the state law claims. In addition to that described in the text above, the opinion below states:

> "*Arnold* v. *District Council No. 9 International Brotherhood of Painters and Allied Trades*, 61 A.D. 2d 748, 401 N.Y.S. 2d 811 (1st Dept. 1978), holds that New York courts will refrain from adjudicating post-election disputes." (App. 4a).

When the *Arnold* opinion is examined, however, it becomes clear that this is simply another formulation of the same federal preclusion point. In *Arnold*, a trial court had declared a union election unlawful, and ordered that a rerun election be held. The Appellate Division reversed, because § 403 of the LMRDA makes the § 402 remedy the exclusive means for setting aside an already-conducted union election. See *Trbovich, supra*.

The Appellate Division in *Arnold* construed § 403 correctly: as precluding state courts from setting aside union elections. As we show in text, *infra*, the decision below in the instant case did not construe § 403 correctly. For the instant case is not a "post-election" effort to challenge "an election already conducted" (§ 403); it is, rather, a pre-election effort to secure an injunction against future conduct.

It should be noted that the Appellate Division's decision in *Arnold*, was reversed by the New York Court of Appeals, — N.Y. —, 101 LRRM 2184 (1979), on the ground that the position in dispute was not an "officer" position covered by the LMRDA, and hence § 403 was inapplicable.

construes the LMRDA, is contrary to this Court's opinion in *Trbovich, supra,* and conflicts with decisions of other Circuits.

Congress intended Title IV to pre-empt state law actions in certain instances, but not others. The full extent of the preclusion which Congress intended appears in the last sentence of § 403:

> "The remedy provided by this subchapter *for challenging an election already conducted* shall be exclusive" (emphasis added).

But § 403 does not preclude state law actions seeking injunctive relief with respect to *future* elections. As this Court explained in *Trbovich* v. *Mine Workers,* 404 U.S. 528, 531 (1972):

> "With respect to elections not yet conducted, the statute provides that existing rights and remedies apart from the statute are not affected."

And two Circuits have construed § 403 not to preclude private action relating to elections so long as the relief sought does not entail setting aside an already-conducted election. *Ross* v. *International Bro. of Electrical Workers,* 513 F.2d 840, 842-843 (9th Cir. 1975) (tort claim for damages for injuries inflicted upon candidate during election campaign); *Amalgamated Clothing Workers* v. *Amalgamated Clothing Workers,* 473 F.2d 1303, 1305-06 (3rd Cir. 1973) (private action under Title I of LMRDA to secure prospective invalidation of union election rule).

The decision below thus accords to Title IV a pre-emptive effect which greatly exceeds that which Congress intended. The decision is inconsistent with this Court's construction of Title IV in *Trbovich,* conflict with decisions of other Circuits, and, for the reasons spelled out in Part I above, undermines Congress' objective that employers not interfere in union elections.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to review the decision below.

Respectively submitted,

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Appendix A

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 33—September Term, 1979.

(Argued October 31, 1979 Decided November 1, 1979.)

Docket No. 79-7295

LLOYD MCBRIDE, PRESIDENT AND FRANK MCKEE, TREASURER, FOR AND ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND ITS ENTIRE MEMBERSHIP, AND LYNN WILLIAMS, JOSEPH ODORCICH, LEON LYNCH, ERNEST JANAK, ROBERT CLOWERS, DICK EAGLEHOUSE, ROBERT KELLEY, AND FRANK ANGLIN,

Plaintiffs-Appellants,

v.

ROCKEFELLER FAMILY FUND, NEW WORLD FOUNDATION, FIELD FOUNDATION, SAMUEL RUBIN FOUNDATION, J. M. KAPLAN FUND, INC., OTTINGER FOUNDATION, COMMUNITY FUNDS, INC., YOUTH PROJECT, AND ASSOCIATION FOR UNION DEMOCRACY,

Defendants-Appellees.

Before:

MOORE, TIMBERS AND VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, John M. Cannella, District Judge, dismissing a complaint under 29 U.S.C. § 481(g) (1976) and New York common law for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6).

MICHAEL H. GOTTESMAN, Washington, D.C. (Robert M. Weinberg, David M. Silberman, and Bredhoff, Gottesman, Cohen & Weinberg, Washington, D.C., and Cohen, Weiss and Simon, New York, N.Y., on the brief), *for plaintiffs-appellants.*

WILLIAM E. JACKSON, New York, N.Y. (Sharon W. Lindsay, and Millbank, Tweed, Hadley & McCloy, New York, N.Y., on the brief), *for defendants-appellees Rockefeller Family Fund and Community Funds, Inc.*

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York, N.Y. (Richard Wasserman, of counsel), *for defendants-appellees Field Foundation and New World Foundation.*

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, N.Y. (William Josephson, of counsel), *for defendants-appellees Samuel Rubin Foundation, The J. M. Kaplan Fund, Inc. and The Ottinger Foundation, Inc.*

GILBERT, SEGAL AND YOUNG, New York, N.Y. (Bernard J. Rosenthal, of counsel), *for defendant-appellee Youth Project.*

STANLEY ENGELSTEIN, New York, N.Y., *for defendant-appellee Association for Union Democracy, Inc.*

PER CURIAM:

Appellants, officers and members of the United Steelworkers of America, AFL-CIO-CLC, commenced an action

on April 19, 1978 in the Southern District of New York against appellees for violations of Section 401(g) of Title IV of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 481(g) (1976), and New York common law, alleging that appellees made illicit contributions to a group of union candidates during the 1977 nationwide union election. The district court, John M. Cannella, *District Judge,* on April 13, 1979 dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6). This appeal followed.

The issues before us are whether the district court erred in holding (1) that union members do not have an *implied* private right of action to enjoin employers from making expenditures in union elections in violation of § 401(g) of the LMRDA, and (2) that appellant union members do not have a claim under common law or state law in this case.

We agree with the district judge that union members do not have an implied private right of action against employers who violate § 401(g) of the LMRDA. Section 401(g) provides:

> "No moneys received by any labor organization by ways of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this sub-chapter. . . ."

The express remedy for violations of § 401(g), provided by Congress in § 402(g) of the LMRDA, authorizes the Secretary of Labor to conduct investigations and commence civil actions in response to complaints by union members. Appellants admit that the express remedy provided in § 402 is exclusive insofar as it relates to *unions* that violate § 401(g). They nevertheless argue that a private right against *employers* who violate § 401(g) is implicit in the statute.

We do not believe that Congress intended to give union members the right to bring private actions against employers. Congress decided to utilize the "special knowledge and

discretion'' of the Secretary of Labor in determining which suits to prosecute; proposals to permit private enforcement of Title IV violations were considered by Congress and rejected. While appellants would have us believe that the rejection of such proposals for private enforcement is no indication of Congressional intent with respect to employers who violate § 401(g), there is no substantial evidence that Congress distinguished employers and unions in this area.

The express remedy provided by Congress is adequate to deal with employer contributions to union candidates as well as union contributions to union candidates. If an election outcome is tainted by employer contributions to candidates, the Secretary can act to invalidate the election and oust the improperly elected officials. The remedy is the same, irrespective of the identity of the § 401 violators.

If a private right of action against employers were provided under this statute, the centralization of litigation and the limitation on judicial interference in union affairs which now exist would be disrupted. The purpose of the express remedy in § 402 is to allow the Secretary of Labor to prevent violations of § 401 from resulting in the tainted election of union officials. We hold that Congress did not intend to give individual union members unfettered discretion to pursue individual suits against individual violators.

We also hold that the district court did not err in dismissing the state tort claims. *Arnold* v. *District Council No. 9 International Brotherhood of Painters and Allied Trades*, 61 A.D. 2d 748, 401 N.Y.S.2d 811 (1st Dept. 1978), holds that New York courts will refrain from adjudicating post-election disputes. Moreover, the fact that the torts alleged here are inextricably bound up in the statutory provisions of Title IV of the LMRDA provides strong support for the view that the statutory remedies in the Act preclude state courts from addressing these issues.

Affirmed.

Appendix B

United States District Court
SOUTHERN DISTRICT OF NEW YORK

LLOYD MCBRIDE, PRESIDENT AND FRANK MCKEE, TREASURER, FOR AND ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND ITS ENTIRE MEMBERSHIP [et al.],

Plaintiffs,

against

ROCKEFELLER FAMILY FUND [et al.],

Defendants.

MEMORANDUM AND ORDER
78 Civ. 1762 (JMC)

CANNELLA, D. J.:

Defendant's motion, to dismiss the complaint for failure to state a claim for relief, is granted. Fed. R. Civ. P. 12(b)(6).

FACTS

Taking the complaint as true, this is an action brought by the officers and members of the United Steelworkers of America [the "union"] on behalf of themselves and the entire union membership seeking, among other things: (1) a declaratory judgment that defendants violated 29 U.S.C. § 481(g) and the common law of the State of New York during the 1977 union election; (2) an injunction against future violations by the defendants; and (3) compensatory damages.

During the 1977 nationwide union election the defendants contributed money to a group of union candidates known as the "Sadlowski slate." Defendant Association for Union Democracy, was used by the other defendants to "launder" the money. The Sadlowski slate was defeated in the election.

All the defendants now move to dismiss on the grounds that there is no private right of action for violations of

29 U.S.C. § 481(g) and that the complaint fails to state a claim under the law of New York. The Court agrees.

DISCUSSION

The statute on which plaintiffs rely reads, in relevant part:

> No moneys received by any labor organization by way of dues, assessment or similar levy, and no moneys of any employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter.

29 U.S.C. § 481(g). Plaintiffs argue that the Courts should infer a private right of action, against employers, from this language and the balance of the statutory scheme. The Court finds, however, that the statutes manifest "an explicit purpose to *deny* such a cause of action." *Cort* v. *Ash*, 422 U.S. 66, 82 (1975). The exclusive remedy for violations of the above statute is set forth in 29 U.S.C. § 482. The procedure allows any union member, who has exhausted his internal union remedies, to file a complaint with the Secretary of Labor alleging a violation of the statute. The Secretary must investigate the complaint and if he finds probable cause to believe that the statute has been violated, he must bring a civil action, against the union, in the appropriate district court. Therefore, "[i]t is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order to best serve the public interest." *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

Plaintiffs argue that this leads to an incongruous result: the union's only remedy for employer violations is to ask the Secretary to sue the union. However, the Court is convinced that the statutory remedies adequately redress any violations. If employer-financed candidates prevail in an election, the wrongdoers would be the target of the Secretary's lawsuit. Moreover, based on the fact that the alleged

unlawful contributions by defendants did *not* materially affect the outcome of the 1977 election, plaintiffs ask the Court to speculate that future contributions *will* influence the results of elections yet to be held. *Cf.* 29 U.S.C. § 482(c)(2). In sum, the Court believes that disputes of this type are to be resolved by the administrative and judicial procedures set forth in the statutes. In this regard, there is no allegation that plaintiffs have sought to invoke the Secretary's jurisdiction under 29 U.S.C. § 521.

Similarly, as to the purported state law claims, the New York courts have recognized their lack of jurisdiction over union election disputes. *Arnold* v. *District Council No. 9, International Brotherhood of Painters*, 61 A.D.2d 748, 401 N.Y.S.2d 811 (1st Dep't), *appeal dismissed*, 45 N.Y.2d 732, 408 N.Y.S.2d 503 (1978).

CONCLUSION

For the foregoing reasons, the Clerk of the Court is directed to enter a judgment, dismissing the complaint as to all defendants. Fed. R. Civ. P. 12(b)(6).

SO ORDERED.

JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
April 9, 1979.

Appendix C

United States District Court
SOUTHERN DISTRICT OF NEW YORK

LLOYD MCBRIDE, PRESIDENT AND FRANK MCKEE, TREASURER, FOR AND ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND ITS ENTIRE MEMBERSHIP,

AND

LYNN WILLIAMS, JOSEPH ODORCICH, LEON LYNCH, ERNEST JANAK, ROBERT CLOWERS, DICK EAGLEHOUSE, ROBERT KELLEY, AND FRANK ANGLIN,

Plaintiffs,

v.

ROCKEFELLER FAMILY FUND, NEW WORLD FOUNDATION, FIELD FOUNDATION, SAMUEL RUBIN FOUNDATION, J. M. KAPLAN FUND, INC., OTTINGER FOUNDATION, COMMUNITY FUNDS, INC., YOUTH PROJECT, AND ASSOCIATION FOR UNION DEMOCRACY,

Defendants.

No. 78 Civ. 1762 (JMC)

COMPLAINT

JURY TRIAL DEMANDED

Introduction

1. This action is brought by the duly elected President and Treasurer of the United Steelworkers of America, AFL-CIO-CLC ("USWA"), for and on behalf of the Union and its members, and by eight other members of USWA. The defendants are multi-million dollar, tax-exempt organizations, themselves employers, and financed by employer contributions. Defendants have caused, and unless enjoined will continue to cause, employer monies to be contributed to and expended on behalf of candidates for USWA offices

in blatant violation of Section 401(g) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 481(g), and the common law of the State of New York. These illegal expenditures by the defendant-employers have threatened the democratic integrity of USWA elections, pose a continuing threat to democracy within the Steelworkers Union, deprive the Union's members of their right to elections free from employer interference, jeopardize the legality of USWA elections, and expose the Union to potential costs of millions of dollars should an election be set aside because of these illegal expenditures.

Jurisdiction

2. This action arises under § 401(g) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 481(g), the Declaratory Judgment Act, 28 U.S.C. § 2201, and the laws of the State of New York. The amount in controversy exceeds the sum of $10,000, exclusive of costs. The court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1337, and pendant jurisdiction.

Parties

3. Lloyd McBride and Frank McKee are members in good standing of USWA and are, respectively, President and Treasurer of USWA, having been duly elected in February 1977. They sue for and on behalf of USWA and its membership, as authorized by Section 12 of the General Association Law of New York. These plaintiffs are, respectively, citizens of Missouri and California.

4. Lynn Williams, Joseph Odorcich, Leon Lynch, Ernest Janak, Robert Clowers, Dick Eaglehouse, Robert Kelley, and Frank Anglin are, respectively, citizens of Canada, Pennsylvania, Pennsylvania, Texas, Texas, Pennsylvania, Missouri and California. All are members in good standing of USWA; in addition, Lynn Williams is Secretary of USWA, Joseph Odorcich is Vice-President (Administra-

tion) and Leon Lynch is Vice-President (Human Affairs).

5. The Rockefeller Family Fund, Inc., is a tax-exempt New York corporation whose principal place of business is in the State of New York and which does business in the Southern District of New York. It has investments amounting to over three million dollars in corporations with which USWA has collective bargaining relationships.

6. The Samuel J. Rubin Foundation, Inc. is a tax-exempt New York corporation whose principal place of business is in the State of New York and which does business in the Southern District of New York. It has investments amounting to over five million dollars in corporations with which USWA has collective bargaining relationships.

7. The Field Foundation, Inc., is a tax-exempt New York corporation whose principal place of business is in the State of New York and which does business in the Southern District of New York. It has investments amounting to over three and one-half million dollars in corporations with which USWA has collective bargaining relationships.

8. The New World Foundation is a tax-exempt Illinois corporation whose principal place of business is in the State of New York and which does business in the Southern District of New York. It has investments amounting to almost a quarter-million dollars in corporations with which USWA has collective bargaining relationships.

9. The J. M. Kaplan Fund, Inc. is a New York corporation whose principal place of business is in the State of New York and which does business in the Southern District of New York. It has investments amounting to over four million dollars in corporations with which USWA has collective bargaining relationships.

10. The Ottinger Foundation is a tax-exempt New York corporation whose principal place of business is in the State of New York and which does business in the Southern District of New York. It has investments amounting to more

than three hundred thousand dollars in corporations with which USWA has collective bargaining relationships.

11. Community Funds, Inc., affiliated with the New York Community Trust, is a tax-exempt New York corporation whose principal place of business is in the State of New York and which does business in the Southern District of New York.

12. The Youth Project is a tax-exempt District of Columbia corporation whose principal place of business is in the District of Columbia and which does business in the Southern District of New York.

13. The Association for Union Democracy is a tax-exempt New York corporation whose principal place of business is in the State of New York and which does business in the Southern District of New York.

COUNT ONE

14. The United Steelworkers of America, AFL-CIO-CLC, is an international labor organization which is the principal collective bargaining representative of workers in the United States and Canada employed in the steel, iron ore, aluminum, copper, chemical, container, lead, zinc, gold and silver industries and in plants which fabricate products from these materials. USWA has approximately 1,400,000 members.

15. USWA is one of the few and by far the largest of the unions that elect their international officers by referendum vote. Pursuant to the USWA Constitution, Article V, §§ 2 and 3, officers are elected for four-year terms, and all members in good standing of USWA are entitled to vote.

16. All elections of USWA's international officers and of officers of USWA's locals within the United States, are governed by Title IV of the LMRDA, 29 U.S.C. §§ 481-483.

17. Section 401(g) of Title IV of the LMRDA, 29 U.S.C. § 481(g), provides that "no monies of an employer shall be

contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title." The Department of Labor's implementing regulations make clear that this prohibition "includes indirect as well as direct expenditures . . . includ[ing] any costs incurred by an employer, in order to support the candidacy of any individual in an election." 29 C.F.R. § 452.78(a).

18. The term "employer" as used in the LMRDA is defined in § 3(e), 29 U.S.C. § 402(e), to include, *inter alia*, "any employer . . . engaged in an industry affecting commerce . . . which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees." The term "employer" is "not restricted to employers who employ members of the labor organization in which the election is being conducted, or who have any business or contractual relationship with the labor organization." 29 C.F.R. § 452.78(b).

19. The purpose of § 401(g) is to assure that union elections reflect the views of union members—and not of employers—as to who should represent and lead the union. Whenever an employer makes contributions to a candidate for union office, this vital congressional policy is infringed, and the union and its members suffer an injury to their right to conduct their elections free from employer interference.

20. If an employer makes contributions to a candidate which may have affected the outcome of a union election, the Secretary of Labor is authorized to sue that union to set aside its election. Such litigation is costly to the union, and for as long as the litigation proceeds, places a cloud over title to the office. The ability of the elected officeholder to provide leadership in bargaining and in concerted activities—and thus the ability of the union to perform its essential functions—is seriously compromised by the pendency of a suit to overturn an election.

21. If a court finds, in a suit brought by the Secretary of Labor, that employer contributions may have affected the outcome of a union election, the court is authorized to invalidate that election and order that a new election be conducted at the expense of the union. Financing rerun elections imposes a sizable burden on the treasury of unions—in the case of USWA, a rerun election would cost millions of dollars. Moreover, once an election is invalidated, a union is effectively paralyzed and placed in turmoil, until the winner of the rerun is finally determined.

22. In February, 1977, USWA held a contested election for its top offices. The rival slates were headed by Lloyd McBride and Edward Sadlowski. The Sadlowski slate was largely underwritten by tax-exempt corporations which are employers under LMRDA.

23. Defendants are all engaged in industries affecting commerce, and are "employers" within the meaning of the LMRDA. Defendants also are recipients of employer monies, and are investors in employers, with investments exceeding sixteen million dollars in employers with which USWA has collective bargaining relationships.

24. Defendants Rockefeller Family Fund, New World Foundation, Field Foundation, Samuel Rubin Foundation, Inc., J. M. Kaplan Fund, Inc., Ottinger Foundation, Community Funds, Inc., Youth Project, and other employers unknown at present to plaintiffs, used defendant Association for Union Democracy ("AUD") and other employers unknown at present to plaintiffs, as conduits through which monies and other assets were laundered for use by or on behalf of the Sadlowski slate. These expenditures were *ultra vires*, and were outside the scope of expenditures permitted to be made by tax-exempt organizations. In addition, officers, directors, and managing employees of these defendants made substantial contributions directly to the Sadlowski slate campaign.

25. The defendants (other than AUD) channelled monies

and assets to the AUD, and to other conduits as yet unknown, in the guise of ostensibly non-partisan grants. In actuality, however, the monies and assets were intended by all defendants to be used for blatantly partisan activities promoting the Sadlowski slate, and they were so used by AUD and other conduits with the knowledge and prior approval of the other defendants. In this manner, enormous sums were expended by the defendants other than AUD on behalf of the Sadlowski slate. By making these expenditures, these defendants violated § 401(g) of the LMRDA.

26. Defendant Association for Union Democracy (AUD) violated § 401(g) with respect to the 1977 USWA election by expending virtually its entire budget for the years 1976 and 1977 to promote the Sadlowski slate, including monies and assets donated to it for this purpose by the other named defendants and by other unnamed employers. Specifically:

(a) From an unmarked store front adjacent to the Sadlowski headquarters, pursuant to arrangements negotiated with the Sadlowski slate, defendant AUD recruited and trained over one thousand persons to work as election-day observers throughout the United States on behalf of the Sadlowski slate. The observers recruited and trained by AUD all bore credentials, signed by members of the Sadlowski slate, identifying them as observers for the Sadlowski slate. These observers reported only to the Sadlowski slate, and reported only such information as could be used to benefit the Sadlowski slate. Despite the fact that defendant AUD's "observer program" was headquartered in Sadlowski's home district, where the election in many local unions was under the control of election tellers friendly to the Sadlowski slate, and despite the fact that at many other locals throughout the United States the election was conducted by tellers friendly to the Sadlowski slate, defendant AUD did not offer to recruit or train persons to serve as observers on behalf of the McBride slate. Indeed, defendant AUD refused, when requested,

to provide like services to the McBride slate or to representatives chosen by it. The cost of recruiting and training of observers is a routine campaign expense incurred by all candidates for union office; in this instance, however, the Sadlowski slate obtained an unlawful advantage by reason of defendants' illegal expenditures, for it did not have to spend lawfully obtained contributions to recruit and train observers and thus had more funds available for other campaign purposes.

(b) Defendant AUD prepared and printed tens of thousands of copies of an election manual instructing observers and other union members about their election rights. That manual was distributed exclusively to Sadlowski slate supporters. McBride slate supporters were refused copies of the manual when they requested them. The cost of providing such instructions to supporters is a routine campaign expense incurred by all candidates for union office; in this instance, however, the Sadlowski slate obtained an unlawful advantage by reason of defendants' illegal expenditures, for it did not have to spend lawfully obtained contributions to prepare, print and distribute such instructions, and thus had more funds available for other campaign purposes.

(c) Several lawsuits were filed during the course of the 1977 election campaign. At the request of the Sadlowski slate, defendant AUD assigned its legal director, Judith Schneider, and other AUD lawyers, to work as the Sadlowski slate's representatives. Through Schneider and its other lawyers, defendant AUD provided free legal assistance to the Sadlowski slate, even though the Sadlowski slate had able counsel representing it apart from AUD. Defendant AUD represented Sadlowski slate members in a number of lawsuits initiated by them, and defended Sadlowski in a lawsuit brought against him. All of this litigation related to the

election and promoted the candidacy of the members of the Sadlowski slate.

(d) Located in an office adjacent to Sadlowski slate headquarters, defendant AUD, acting through its legal director, Judith Schneider, and other employees, provided, without cost to the Sadlowski slate, campaign services for the slate. These AUD representatives, acting on behalf of the Sadlowski slate, held press conferences, monitored rival press conferences, represented the Sadlowski slate at meetings of the candidates, drafted campaign literature, provided day-to-day administrative assistance and support to the Sadlowski slate campaign, and otherwise participated in the development and implementation of the Sadlowski slate's campaign strategy. Defendant AUD's legal director was so closely associated with the Sadlowski slate campaign that she was variously described in the press as a "part of the informal Sadlowski entourage" and as a campaign "spokesman," and she was reported in the press as referring to Sadlowski as "her man."

27. Defendants' activities violated § 401(g), frustrated the congressional policy embodied in that section, and deprived plaintiffs of their right under the LMRDA to have USWA officers elected free from interference by employers.

28. USWA expended time, money and manpower during the months preceding the election, which would not have been necessary but for the illegal actions of defendants, (a) to preserve the integrity and legality of the USWA election in the face of the massive infusion of illegal monies by defendants, and (b) as a direct result of the activities generated by the illegal monies contributed by defendants.

29. Defendants have pursued and are continuing to pursue a policy of unlawfully spending vast sums of money and other assets to influence the outcome of union elections. The expenditures in the 1977 USWA elections were just one of

a number of instances in which illegal expenditures have been made by defendants on behalf of candidates for union offices. Defendants are committed to a general policy of spending employer monies to elect union officials sympathetic to the defendants-employers' view. AUD has continued to spend its own monies, and monies conduited to it by the other defendants, even after the conclusion of the 1977 election, in order to maintain the viability of its candidates for future USWA elections.

30. Unless enjoined from so doing, defendants will continue to pursue their policy of intervening in USWA elections in violation of § 401(g); plaintiffs and the USWA membership will continue to be deprived of their statutory right to have USWA elections conducted free from employer interferences; USWA will be subjected to additional expenditures of time, money and manpower; the validity of USWA elections will be imperiled; and USWA will be subject to lawsuits by the Secretary of Labor challenging its elections, internal turmoil caused by clouds upon title to union office, and the potential of millions of dollars in costs if a rerun election is required. With respect to these dangers, plaintiffs have no adequate remedy at law.

COUNT TWO

31. Plaintiffs incorporate by reference as if fully alleged here paragraphs 14-28 above.

32. Defendants' intentional acts, described in paragraphs 24-26 above, had the necessary and foreseeable effect of threatening the legality of the USWA election under the LMRDA, and subjecting USWA and its membership to the risk of litigation and of being compelled to incur the costs and internal chaos of having the election of USWA's top officers set aside and having to conduct a rerun election. Defendants' conduct thus constitutes an intentional tort under the laws of the State of New York.

33. Plaintiffs incorporate by reference as if fully alleged here paragraphs 29-30 above.

34. Unless enjoined from so doing, defendants will continue to commit intentional torts with respect to USWA elections, and plaintiffs will continue to be subjected to the injuries described in paragraph 32.

COUNT THREE

35. Section 4 of the USWA International Union Elections Manual provides that "No monies of an employer shall be contributed or applied to promote the candidacy of any person." This provision reflects USWA's own decision that the members must have the right to freely and democratically select their leaders without employer interference.

36. Defendants are "employers" within the meaning of the USWA Elections Manual.

37. The USWA Elections Manual constitutes a valid, binding, and enforceable contract between USWA and its members.

38. Plaintiffs incorporate by reference as if fully alleged here paragraphs 14-28 above.

39. In engaging in the above described conduct, defendants intentionally induced the USWA members running for office on the Sadlowski slate, and the observers and other members of USWA who utilized employer monies to promote the candidacy of the Sadlowski slate, to breach their contractual duties owed to USWA and the entire membership not to accept contributions of employers. Defendants were aware of this contractual duty of USWA members at the time that they induced the members to breach it.

40. But for defendants' conduct, the aforesaid members' contract with USWA and the entire membership would not have been breached. As a result of defendants' conduct, plaintiffs were deprived of their rights under that contract.

41. Plaintiffs incorporate by reference as if fully alleged here paragraph 29-30 above.

42. Unless enjoined from so doing, defendants will continue intentionally to cause USWA members to breach their contract, and plaintiffs will continue to be deprived of their rights under that contract.

WHEREFORE, plaintiffs pray that this Court:

a. Declare that defendants' conduct during the 1977 USWA election violated § 401(g) of the LMRDA and the common law of the State of New York;

b. Enjoin the defendants from engaging in future violations of § 401(g) and commission of the torts sets forth in Counts II and III, with respect to any USWA election;

c. Award damages in amounts sufficient to compensate plaintiffs for the injuries they have suffered on account of defendants' wrongful acts;

d. Award plaintiffs their costs in this action;

e. Award plaintiffs such other relief as the interests of equity and justice require.

DEMAND FOR JURY TRIAL

43. Plaintiffs defand trial by jury in this action.

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Appendix D
STATUTORY PROVISIONS INVOLVED

Section 401(g) of the LMRDA, 29 U.S.C. § 481(g), provides in pertinent part as follows:

> No moneys received by any labor organization by way of dues, assessments, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter.

Sections 402(a), (b) and (c) of the LMRDA, 29 U.S.C. §§ 482(a), (b) and (c), provide in pertinent part as follows:

> (a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
>
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor

organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 481 of this title, or

(2) that the violation of section 481 of this title may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. . . .

Section 403 of the LMRDA, 29 U.S.C. § 483, provides as follows:

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this subchapter. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of

this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1979

No. 79-1177

LLOYD MCBRIDE, President and FRANK MCKEE, Treasurer, for and on behalf of the United Steelworkers of America, AFL-CIO-CLC and its entire membership, and LYNN WILLIAMS, JOSEPH ODORICH, LEON LYNCH, ERNEST JANAK, ROBERT CLOWERS, DICK EAGLEHOUSE, ROBERT KELLEY, and FRANK ANGLIN,

Petitioners,

v.

ROCKEFELLER FAMILY FUND, NEW WORLD FOUNDATION, FIELD FOUNDATION, SAMUEL RUBIN FOUNDATION, J. M. KAPLAN FUND, INC., OTTINGER FOUNDATION, COMMUNITY FUNDS, INC., YOUTH PROJECT, and ASSOCIATION FOR UNION DEMOCRACY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Rockefeller Family Fund and Community Funds, Inc. oppose the petition of Lloyd McBride, et al., for a writ of certiorari. Petitioners have demonstrated no special or important reason for review. Their dissatisfaction with the decision below is insufficient.

QUESTIONS PRESENTED

1. Does the decision of the Court of Appeals affirming the District Court's refusal to imply a private right of action to enforce Section 401(g) of the Labor—Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 481(g), conflict in any way with applicable decisions of this Court?

2. Is the decision below in conflict with the decision of a Court of Appeals for another Circuit?

STATUTORY PROVISIONS INVOLVED

Section 401, which was not set forth in its entirety in the Appendix to the petition, is reprinted in full in the Appendix to this brief.

STATEMENT OF THE CASE

The Complaint

Plaintiffs-petitioners, officers and members of the United Steelworkers of America (the "union"), commenced this action purportedly on behalf of the union and its membership, seeking injunctive relief and damages for alleged violations of § 401(g) of Title IV of the LMRDA and unspecified provisions of the law of the State of New York (Complaint ¶ 1, A.* 8a-9a).

Count I of the complaint alleged in substance that defendants-respondents Rockefeller Family Fund, The New World Foundation, Inc., J.M. Kaplan Fund, Inc., Field Foundation, Samuel Rubin Foundation, Ottinger Foundation, Community Funds, Inc. and Youth Project (hereinafter sometimes collectively referred to as "defendant-donors") violated § 401(g) of the LMRDA by making grants to defendant-respondent Association for Union Democracy ("AUD") as a conduit to funnel the grants to a slate of insurgent candidates headed by Edward Sadlowski in the February 1977 campaign for election of union officers (Complaint ¶ 24, A. 13a); that

* References to "A." are to pages of the Appendix to the petition.

the opposing slate headed by plaintiff Lloyd McBride was elected* (Complaint ¶ 22, A. 13a); that defendants, although not alleged to employ members of the union, are "employers" within the meaning of § 401(g) (Complaint ¶ 23, A. 13a); and that defendants' acts "deprived plaintiffs of their right under the LMRDA to have USWA officers elected free from interference by employers" (Complaint ¶ 27, A. 16a).

Count I failed to allege fulfillment of certain conditions required by § 402 for enforcement of § 401(g), namely: (1) that plaintiffs have exhausted internal union procedures; (2) that they have complained to the Secretary of Labor; and (3) that the Secretary has found probable cause to believe that the 1977 union election was invalidated by defendants' wrongdoing. See 29 U.S.C. § 482 (A. 21a-22a). The absence of taint in the election is obvious from plaintiff McBride's victory (Complaint ¶ 32, A. 13a).

Counts II and III alleged in substance that defendants' conduct in connection with the February 1977 election "constitutes an intentional tort under the laws of the State of New York" (Complaint ¶ 32, A. 17a) and an inducement of breach of the contract contained in the union's Elections Manual (Complaint ¶¶ 35-40, A. 18a); that plaintiffs were deprived of their "right to freely and democratically select their leaders without employer interference" (Complaint ¶ 35, A. 18a); and that plaintiffs were damaged by the threat posed thereby to the legality of the 1977 union election (Complaint ¶ 32, A. 17a).

The relief sought was a declaratory judgment that defendants' alleged conduct during the 1977 election violated § 401(g) of the LMRDA and the laws of New York, an injunction against future violations, and damages** (Complaint, A. 19a).

* The petition (p. 4) concedes that "The monies spent by defendants did not affect the outcome of the 1977 USWA election; all members of the benefited slate lost."

** Plaintiffs have now abandoned their damages claim. (See, Petition, p. 3, footnote 2.)

Proceedings and Decisions Below

Defendants moved the District Court for an order dismissing the complaint on the grounds that assuming, *arguendo,* the truth of plaintiffs' allegations, the Court was without federal jurisdiction to determine whether or not the actions complained of violated § 401(g) of the LMRDA inasmuch as Congress had explicitly conferred the sole power to make this determination on the Secretary of Labor, and was without pendent jurisdiction to determine the validity of the purported state law causes of action inasmuch as Congress had legislated an exclusive, preemptive federal remedy for adjudicating all election complaints stemming from the subject matter of § 401. The District Court (Canella, J.) granted the motion and dismissed all three counts of the complaint (A. 5a-7a).

The Court of Appeals affirmed (A. 1a-4a). The Court found that the procedure for enforcement by the Secretary set forth in § 402 of the LMRDA constituted the exclusive enforcement procedure for all violations of § 401(g), regardless of whether the alleged violator was affiliated with a union or an employer; that such procedure is "adequate to deal with employer contributions to union candidates as well as union contributions to union candidates"; and that the remedy Congress provided redressed the violation "irrespective of the identity of the § 401 violators" (A. 4a). The Court held that the implication of a private right of action by plaintiffs would disrupt "the centralization of litigation and the limitation on judicial interference in union affairs" which Congress intended by vesting all enforcement authority in the Secretary of Labor and by authorizing the Secretary to act only where necessary to prevent "violations of § 401 from resulting in the tainted election of union officials" (A. 4a).

The Court of Appeals further held that defendants' alleged conduct did not give rise to any cause of action under the law of New York since the allegations were "inextricably bound up in the statutory provisions of Title IV of the LMRDA" and that the exclusive enforcement mechanism provided therein "preclude[d] state courts from addressing these issues" (A. 4a).

ARGUMENT

I

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW OF THE DECISION BELOW, WHICH IS ENTIRELY CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT ON IMPLIED RIGHTS OF ACTION

While the petition occasionally attempts to suggest that the decision of the Court of Appeals ignores principles announced by this Court (p. 10), its gravamen is that the decision "is wrongly reasoned and wrongly decided" (p. 14). It is, of course, fundamental that mere error is not a ground for certiorari. See, *Magnum Import Co. v. Coty,* 262 U.S. 159, 163 (1923).

The decision below is in full accord with recent decisions of this Court setting forth the prerequisites for implying a private right of action under a federal statute which does not explicitly grant such a right. The teaching of those cases is that the question turns on the intent of Congress. See, *Cort v. Ash,* 422 U.S. 66 (1975); *Cannon v. University of Chicago,* 441 U.S. 677 (1979); *Touche Ross & Co. v. Redington,* U.S. , CCH Fed.Sec.L.Rep. ¶ 96,894 (June 18, 1979); and *Transamerica Mortgage Advisors, Inc. v. Lewis,* U.S. , 48 L.W. 4001 (November 13, 1979). The decision below faithfully followed that teaching and the petition fails to demonstrate the contrary. Accordingly, there is no reason for review by this Court.

Congress amply manifested its intent to deny any private cause of action under Title IV. Congress debated at length and rejected two different bills (S.748 and H.R.8342, 86th Congress, 1st Sess.)—each of which would have permitted private rights of action by union members under Title IV regardless of the identity of the transgressors—and chose, instead, to confer exclusive enforcement powers on the Secretary of Labor. See, S.Rep. No. 187, 86th Congress, 1st Sess., p. 21 (1950); 2 U.S. Code Congressional and Administrative News, p. 2337. See also, *Wirtz v. Local 153, Glass Bottle Blowers Association of*

U.S. and Canada, 389 U.S. 463, 473 (1968) ("Congress deliberately gave exclusive enforcement authority to the Secretary . . . In so doing, Congress rejected other proposals, among them plans that would have authorized suits by complaining members in their own right."); *Calhoon v. Harvey,* 379 U.S. 134, 140 (1964); *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 533-536 (1972); *Dunlop v. Bachowski,* 421 U.S. 560, 566-7 (1975).

This indication of Congressional intent to deny any right of private enforcement is, as this Court held in *Cort v. Ash, supra,* "controlling". 422 U.S. at 82. See also, *Touche Ross & Co. v. Redington, supra,* CCH Fed.Sec.L.Rep. ¶ 96,894 at 95,670 ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

Additional and compelling evidence of Congress's deliberate intent to deny any private right of action for any violation of Title IV of the LMRDA is found in the very structure of the Act as adopted: both in the provision of an exclusive remedy for such violations (29 U.S.C. §§482, 483) and in the provision for private enforcement of another part— Title I—of the same statute (29 U.S.C. § 412). See, *Amalgamated Clothing Workers v. Amalgamated Clothing Workers,* 473 F.2d 1303, 1305 (3rd Cir. 1973).

As noted above, Congress explicitly conferred on the Secretary of Labor exclusive jurisdiction to bring suit to enforce § 401—including § 401(g), regardless of the identity of the violators—and only upon the finding that a violation may have tainted the outcome of the election. There is nothing "bizarre" (Petition, p. 12) about this remedy where employer rather than union monies are contributed to or applied in an election campaign. If the Secretary finds that such monies tainted the election outcome, his object is the same regardless of the identity of the contributor: invalidation of the election and ouster of the improperly elected union officials. Any "burden" (Petition, pp. 9-10) on union rank and file of voiding the tainted election and of holding a new one is inherent in the

Congressional remedy and is no different when employers rather than union members or officers are the alleged violators.

In view of the express and exclusive remedy provided by Congress, as this Court noted in *Transamerica Mortgage Advisers Inc. v. Lewis, supra,* 48 L.W. at 4003, "... it is highly improbable that Congress absentmindedly forgot to mention an intended private right of action (citations omitted)." In keeping with the mandate of Congress, this Court has held that the method of redress provided by § 402 is the sole remedy for violation of the election procedures set forth in § 401 and has repeatedly refused to permit any action by any party which is in any way inconsistent with that method of redress. See, *Calhoon v. Harvey, supra,* 379 U.S. at 140; *Wirtz v. Local 153, Glass Bottle Blowers Association of U.S. and Canada, supra,* 421 U.S. at 566-7; *Hodgson v. United Steelworkers of America,* 403 U.S. 333, 338-9 (1971).

Congress's reasons for providing the exclusive remedy were summarized by this Court in *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 532 (1972):

> "A review of the legislative history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. Title IV as enacted serves these purposes by referring all complaints to the Secretary so that he can screen out frivolous ones, and by consolidating all meritorious complaints in a single proceeding, the Secretary's suit in federal district court."

Nor are these manifest expressions of Congressional intent somehow without "application" (Petition, p. 13), where the private action is against employers. A mere reading of the complaint suffices to show that there can never be any private action under §401(g), regardless of the identity of the defendant or the nature of the relief requested, which does not, of necessity, intrude upon internal union affairs. As the court

below found, "... there is no substantial evidence that Congress distinguished employers and unions ... If a private right of action against employers were provided under this statute, the centralization of litigation and the limitation on judicial interference in union affairs which now exist would be disrupted" (A. 4a). This case is precisely the type of action which Congress intended to prevent by vesting exclusive enforcement authority in the Secretary of Labor.

Title IV did not create a right to an election free of employer contributions (Petition, p. 12). Nor was it concerned with the mere contribution or application of monies by a union, union member or employer (Petition, p. 13) but with the effect, if any, of such contributions, regardless of their source, on the outcome of an election. The statute expressly provided for enforcement of the sole right which it created—the right to have elected union officials be representative of union rank and file. Contributions, regardless of their source, were not made actionable unless the Secretary of Labor found probable cause to believe that they tainted the election results. In a case such as this, where there admittedly was no taint (Petition, p. 4), no federal right has been violated and, accordingly, there is no need to imply any remedy therefor.

This is not a case like *Wyandotte Transportation Co. v. United States,* 389 U.S. 191 (1967) (Petition, pp. 12-14), where this Court was concerned not with the implication of a private right of action under a federal statute but with the scope of the sovereign powers of the United States government. *Supra,* 389 U.S. at 201. Nor is this a case like *Cannon v. University of Chicago, supra* (Petition, p.12), where this Court found that the relevant legislative history "rather plainly indicates that Congress intended to create such a remedy." *Supra,* 441 U.S. at 694. In the instant action, legislative history clearly establishes that a private right of action was considered and expressly rejected.

The Court of Appeals correctly applied controlling decisions of this Court in holding that "Congress did not intend to

give individual union members unfettered discretion to pursue individual suits against individual violators" (A. p. 4a). Further, as the Court below noted, it follows from the express exclusivity of the statutory remedy provided by Congress (24 U.S.C. § 483) that the so-called state law torts of which plaintiffs complain "are inextricably bound-up in the statutory provisions of Title IV" and, accordingly, are enforceable solely by the Secretary in accordance with federal law. See, *Calhoon v. Harvey, supra* at 138-141 (1964); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959); *Linn v. United Plant Guard Workers of America, Local 114,* 383 U.S. 53, 57-59 (1966). See also, *Arnold v. District Council No. 9, International Bro. of Painters,* 61 A.D.2d 748 (2d Dept.), *appeal dismissed,* 45 N.Y.2d 732 (1978), *rev'd on other grounds,* 46 N.Y.2d 999 (1979).

Congressional intent is dispositive and plaintiffs' arguments as to the supposed benefits of private enforcement (Petition, p. 9-10) are misplaced. As this Court recently observed in *Touche Ross & Co. v. Redington, supra,* CCH Fed. Sec.L.Rep. at 95,663:

> "The inquiry in a case such as this ends when it is determined on the basis of the statutory language and the legislative history that Congress did not intend to create, either expressly or by implication, a private cause of action. Further inquiries as to the 'necessity' of implying a private remedy and the proper forum for enforcement of the asserted rights have little relevance to the decision of the case . . . And generalized references to the 'remedial purposes' of the Act do not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit' (citations omitted)."

See also, *Transamerica Mortgage Advisers Inc. v. Lewis, supra,* 48 L.W. at 4004 ("the dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end.").

II

THERE IS NO CONFLICT AMONG THE CIRCUITS

The suggestion that the decision below is in conflict with decisions of other circuits (Petition, p. 10, footnote 9) is not and cannot be substantiated. Indeed, the only other Circuit Court to have addressed the question of whether a private right of action against employers may be implied under a Title of the LMRDA which expressly provides for exclusive enforcement by the Secretary of Labor, recently held that the implication of such a private right of action would conflict with "evidence of legislative intent to provide for enforcement only by the Secretary." See, *Auto Workers v. Right to Work Foundation,* 590 F.2d 1139, 1155 (D.C. Cir. 1978).*

Nor is there any conflict among the Circuits on the question of the exclusivity of the remedy set forth in § 402 of the LMRDA (Petition, p. 16). This is not a case like *Amalgamated Clothing Workers v. Amalgamated Clothing Workers, supra.* That suit was brought under the pre-election remedies set forth in Title I, not Title IV, of the LMRDA and Title I, unlike Title IV, expressly provides for such private enforcement actions. Moreover, the Third Circuit noted in its opinion that "it has been clear that Title IV rights are not enforceable through post-election private suit." *Supra,* 473 F.2d at 1305.

No conflict arises from the decision in *Ross v. International Bro. of Electrical Workers,* 513 F.2d 840 (9th Cir. 1975). There, the plaintiff sued for abuse of process and malicious prosecution, both tort claims having nothing whatever to do with the provisions of Title IV of the LMRDA. As the Ninth Circuit stated, the crux is not the nature of the relief sought (Petition, p. 16), but the substantive origin of the claims.

* The issue there was whether a private right of action against employers should be implied under Title II of the LMRDA, which specifically authorizes only the Secretary of Labor to commence enforcement proceedings. 29 U.S.C. § 440.

Where those claims are inextricably intertwined with the provisions of § 401, as the claims in Counts II and III clearly are, the Ninth Circuit ruled that the remedy legislated by Congress in § 402 is exclusive and all private enforcement actions are precluded. *Ross v. International Bro. of Electrical Workers, supra,* 513 F.2d at 843.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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February 28, 1980

APPENDIX

TITLE IV — ELECTIONS

Terms of Office; Election Procedures (29 U.S.C. 481)

Sec. 401. (a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Every national or international organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective

bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any members thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

(f) When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statemments of issues not involving candidates, and other expenses necessary for the holding of an election.

(h) If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title.

(i) The Secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h).

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Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents, in their brief in opposition (hereinafter "Br. Op."), misstate the legislative history of Title IV of the LMRDA, and make a number of assertions pertaining to the merits of petitioners' federal and state claims which warrant this reply.

I. THE FEDERAL CAUSE OF ACTION

A. Respondents assert that

> "Congress debated at length and rejected two different bills (S. 748 and H.R. 8342, 86th Congress, 1st Sess.)—

> each of which would have permitted private rights of action by union members under Title IV *regardless of the identity of the transgressors*—and chose, instead, to confer exclusive enforcement powers on the Secretary of Labor."

Br. Op. 5 (emphasis added). Respondents argue that the rejection of bills which would have allowed private actions against employers is "controlling" and precludes the implication of a private cause of action (*Id.* at 6).

But, contrary to respondents' assertion, the enforcement provisions in the rejected bills they cite dealt only with union member suits *against unions, for union violations*. Thus, S. 748 provided:

> "An action or proceeding may be maintained in any court of competent jurisdiction by or in behalf of members of a labor organization to obtain appropriate relief *with respect to any act or omission of such labor organization, or of any officer, agent, or other representative thereof,* which is in violation of the provisions of this section or section 303 . . ."[1]

And H.R. 8342 authorized a union member "aggrieved by any violation of Section 401," upon exhausting union remedies, to

> "bring a civil action *against such labor organization* in any district court in the United States for the district having jurisdiction of such labor organization *to prevent and restrain such violation*. . . ."[2]

Respondents thus proceed from an incorrect premise. Neither the bills whose enforcement approach Congress rejected, nor that which Congress enacted, expressly dealt with the question of enforcing the ban on employer contributions. The situation is as we described it in the Petition (p. 11):

[1] S. 748, § 302, reprinted in NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Volume I (hereinafter "I Leg. Hist.") at 112 (emphasis added).

[2] H.R. 8342, § 402(a), reprinted in I. Leg. Hist. 727-728 (emphasis added). See also *id.* at 775.

> "Title IV neither expressly authorizes nor expressly forbids a cause of action against employers. And the legislative history is totally silent on the question. Congress, having imposed a lone obligation upon employers in a title otherwise addressed to unions, did not focus upon the means by which that lone obligation was to be enforced."

B. Respondents, in an effort to draw sustenance from this Court's recent opinion in *Transamerica Mortgage Advisers Inc.* v. *Lewis,* —— U.S. ——, 48 L.W. 4001 (1979), declare:

> "In view of the express and exclusive remedy provided by Congress, as this Court noted in *Transamerica Mortgage Advisers Inc.* v. *Lewis, supra,* 48 L.W. at 4003, '. . . , it is highly improbable that Congress absentmindedly forgot to mention an intended private right of action (citations omitted).' "

Br. Op. 7. But the words in *Transamerica* which Respondents have omitted and replaced with dots are critical to understanding why that opinion does not apply here. In *Transamerica,* the issue was whether clients have an implied cause of action for damages and other monetary relief against investment advisers who violate § 206 of the Investment Advisers Act. This Court enumerated the "judicial and administrative means" which "Congress expressly provided" against investment advisers who violate § 206: criminal prosecution, civil actions by the SEC "to enjoin compliance," and authorization to the SEC "to impose various administrative sanctions on persons who violate . . . § 206." *Id.* at 4003. The Court then continued:

> "In view of these *express provisions for enforcing the duties* imposed by § 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' "

Ibid (emphasis added). Thus the key to this Court's analysis in *Transamerica* was that Congress had specifically addressed the question and legislated "express provisions for enforcing the duties," making it "highly improbable"

that Congress intended other means of enforcement which were not similarly expressed. But this analysis is not applicable to the instant case, for here Congress enacted *no* "express provisions for enforcing the duties" imposed upon employers by § 401 (g) of the LMRDA. We do not ask this Court to conclude that Congress "absentmindedly forgot to mention" an *additional* means of enforcing those duties; we ask this Court to conclude that Congress could not have intended that those duties would go without *any* means of enforcement.

C. In urging the latter point, we have cited *Wyandotte Co.* v. *United States*, 389 U.S. 191, 200, 204 (1967), as indicative that Congress is not to be presumed, absent "persuasive indication," to have intended the express statutory procedures to be "exclusive of all others" where that presumption "would produce the result, extraordinary in our jurisprudence, of a wrongdoer shifting the responsibility for the consequences of his [wrong] onto his victim." (Petition at 12). Respondents answer that in *Wyandotte* "this Court was [not] concerned . . . with the implication of a private right of action under a federal statute . . ." Br. Op. 8. But that is not this Court's view. Only last Term this Court cited *Wyandotte* as exemplifying the following principle:

> "[A] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."

Cannon v. *University of Chicago*, 441 U.S. 677, 703 & n. 35.[3]

[3] Respondents' attempted reliance (Br. Op. 10) upon *Auto Workers* v. *Right To Work Foundation*, 590 F.2d 1139 (D.C. Cir. 1978) is unavailing. The holding in that case was that when the Secretary of Labor has determined that a management consultant is not required to file reports with the Secretary under § 203(b)(1) of Title II of the LMRDA, 29 U.S.C. § 433(b)(1), and thus has elected not to bring the suit to compel filing which is expressly authorized in § 210 of that title, 29 U.S.C. § 440, unions have no implied cause of action to compel management consultants to file reports with the Secretary. Reporting provisions are in any event unlikely candidates for implication of private causes of action, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979), but the more important point, which the District of Columbia Circuit found decisive, is that Congress had considered and expressly rejected creating a dual enforcement mechanism under which private parties as well as the Secretary could sue to compel report filing, opting instead to empower only the Secretary to sue. 590 F.2d at 1154-55.

That Congress expressly rejected a dual enforcement mechanism in Title II is, of course, no indicator of Congress' intent with respect to employer violations of § 401(g). As already noted (*supra*, pp. 3-4), the issue here is not whether there is a private cause of action *in addition to* a government action, but whether there is *any* cause of action against employers. Congress opted for different enforcement schemes in the various titles of the LMRDA, *Hall* v. *Cole*, 412 U.S. 1, 10-11 (1973); *Calhoon* v. *Harvey*, 379 U.S. 134, 138 (1964); *Dunlop* v. *Bachowski*, 421 U.S. 560, 566 (1975), and indeed even between different provisions of the same title, see, e.g., *Calhoon*, 379 U.S. at 140. In some instances, Congress authorized only the Secretary to sue; in some, Congress authorized only union members to sue, see, e.g., §§ 402 (Title I), 501(b) (Title V), 29 U.S.C. §§ 412, 501(b); and in others, Congress authorized suits by both the Secretary and union members, see, e.g., §§ 201(c) and 210 (Title II), and 304(a) (Title III), 29 U.S.C. §§ 431(c), 440, 464(a). But nowhere in the statute, with the exception of the ban on employer contributions in § 401(g), did Congress create a duty and provide *no* express cause of action to enforce that duty. The question it whether this silence reflects a congressional decision that this duty is not to be enforced against employers, or an oversight not indicative of congressional intent.

II. THE STATE LAW CAUSES OF ACTION

The complaint, in Counts II and III, alleges that employer contributions to candidates in future USWA elections would violate state law, and seeks an injunction against

such future state law violations. The court below ruled that "the statutory remedies in the [LMRDA] preclude state courts from addressing these issues" (App. 4a). As we showed in the Petition (15-16), this holding conflicts with this Court's declaration in *Trbovich* v. *Mine Workers,* 404 U.S. 528, 531 (1972) ("[w]ith respect to elections not yet conducted, the statute provides that existing rights and remedies apart from the statute are not affected"), as well as with decisions of two other courts of appeals.

Respondents' answer is so obfuscated that we have difficulty addressing it. Respondents' thesis is stated as follows (Br. Op. 9; see also *id.* 11):

> "[I]t follows from the express exclusivity of the statutory remedy provided by Congress [§ 403 of the LMRDA, 29 U.S.C. § 483] that the so-called state law torts of which plaintiffs complain 'are inextricably bound-up in the statutory provisions of Title IV' and, accordingly, are enforceable solely by the Secretary in accordance with federal law."

But this hardly "follows" from § 403, whose only declaration as to "exclusivity" is that

> "The remedy provided by this subchapter for challeng-
> (Emphasis added).

The instant lawsuit does not challenge "an election already conducted"; it seeks an injunction with respect to conduct in future elections. And this Court has already explained, in *Trbovich, supra,* that in suits relating to future elections "remedies apart from the statute are not affected."

If respondents mean that there is something unique about the particular state law claims in this case that makes them "inextricably bound up" with Title IV, the charge is wholly untrue as to Count III of the complaint,[4] and is

[4] Count III alleges that respondents are inducing union members to breach their contractual commitments, contained in USWA's International Union Elections Manual, not to accept employer monies. The Manual is an internal union bylaw whose existence is in no respect dependent upon Title IV. The resolution of any dispute concerning the meaning of the Manual is one which Congress took pains to emphasize in § 403 would *not* be pre-empted by Title IV:

> "Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter.

Count II, on the other hand, *is* related to Title IV, for the state law tort alleged in that Count is that respondents are intentionally subjecting USWA and its members to jeopardy under federal law (i.e. to the risk that USWA's elections will be invalidated under Title IV). This tort could not occur but for the existence of Title IV.

in any event without legal significance. Petitioners are not seeking to enforce Title IV in Counts II and III, they are seeking to enforce state law. Congress defined, in § 403, the limits of the preemptive effect which Title IV would have upon state law. Congress did not decree that state law would be preempted when it was "bound up" with Title IV —whether "inextricably" or otherwise—and there is no warrant for reading into § 403 a preemption which Congress did not intend.

Respondents seek to distinguish one of the court of appeals decisions which we have said conflicts with the decision below, *Amalgamated Clothing Workers* v. *Amalgamated Clothing Workers,* 473 F.2d 1303 (3rd Cir. 1973), on the ground that the cause of action there was grounded in Title I of the LMRDA which "expressly provides for such private enforcement actions" (Br. Op. 10). But that is not a distinction, for New York law expressly authorizes the prosecution of the state law tort claims advanced here. The issue is not whether authorization to sue exists, but, as respondents concede, "the exclusivity of the remedy" prescribed in Title IV. *Id,* The holding in *Amalgamated* is that the Title IV remedy is not exclusive of remedies in pre-election actions, and that holding is equally applicable

whether the pre-election action is grounded in state law or in federal laws other than Title IV.

Respondents' effort to distinguish the other case which we say is in conflict with the decision below, *Ross* v. *International Bro. of Electrical Workers*, 513 F.2d 840 (9th Cir. 1975) is even wider of the mark. *Ross*, like this case, involved a state law tort claim, and the issue was whether that claim was preempted by § 403. Respondents assert that *Ross* held that in determining whether a state law claim is preempted "the crux is not the nature of the relief sought ... but the substantive origin of the claims" (Br. Op. 10). In fact, as the following excerpt makes clear, *Ross* held precisely the opposite: that the "crux" in determining whether § 403 preempts is whether the relief sought is the setting aside of an already-conducted election:

> "On this appeal Duke, supporting dismissal by the district court, contends that the 'sum total' of appellant's complaint is to attack election-related conduct and that his attempt 'to categorize Count IV as an intentional tort or a common law claim cannot be used as a means of circumventing the clear provisions of Title IV.'
>
> "We cannot agree. Title IV and count IV involve different considerations, different harms and different remedies. The facts of this case serve to make this particularly clear. Appellant now has won his election. He does not, in count IV, challenge it or seek any relief which would interfere with operation of the Local pursuant to the election. Appellees make no claim that the Secretary can now compensate Ross for the harm he claims to have suffered not by violation of rights bestowed by Title IV but by tortious conduct at the hands of Duke. Further, the considerations apparently prompting Congress to choose the remedy it chose in § 402—preventing the blocking or delaying of elections by actions brought by individual members—have nothing to do with, and are not frustrated by, the recovery of monetary damages for election-related torts. We perceive no public purpose to be served by prohibiting

> all civil actions to that end *where challenge to the election is not involved and is not the result.*

513 F.2d at 842-843 (emphasis added).

CONCLUSION

This Court should grant certiorari to review the decision below.

Respectfully submitted,

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